KEPALA BATAS BIHUN SDN BHD v. TENAGA NASIONAL BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-139-01-2014]
3 MARCH 2016

UTILITIES: *Electricity – Tampering of meter – Discrepancy in reading of meter – Claim for loss of revenue – Inspection conducted by respondent's officers – Whether testimony of officers supported allegation that meter was tampered – Computation of loss – Whether there was drop in usage of electricity – Whether proved – Whether presumption under s. 38(4) Electricity Supply Act 1990 rebutted*

Tenaga Nasional Bhd ('the respondent') filed a claim for loss of revenue based on s. 38(3) of the Electricity Supply Act 1990 ('the Act') against the respondent. Based on an investigation conducted, the respondent's officer ('SP1') found that the meter board at the appellant's premises did not record the correct usage of electricity. About a week later, another team of officers headed by SP2 found that the meter recorded a zero reading as shown on the "Borang Pemeriksaan Meter LPC Voltan Rendah". SP2 found that the wiring for the "arus pendua" for the red phase was not connected. Further, there was discrepancy in relation to the reading of the red phase meter. SP4 testified that a remote meter reading ('RMR') installed in relation to the appellant's premises enabled the respondent to read the appellant's meter without the need for a meter reader to be present at the appellant's premises. The respondent's team investigated and found tampering of the meter at the appellant's premises. The respondent claimed for back billing charges and its officer, SP3, testified that the calculation as at 12 May 2011 was based on the daily average use of electricity calculated for a period of four months prior to a sudden drop of the usage. According to SP3, there was a sudden drop of usage of electricity by the appellant on 14 October 2008. Therefore, the back billing charges were calculated from 14 October 2008 until 12 May 2011, *ie,* the date of inspection. SD1, a consultant with the appellant who joined the company in November 2011, testified on behalf of the appellant. It was also asserted, *inter alia,* that (i) if there was such a tampering, it could have been discovered much earlier through the RMR; (ii) the respondent was not entitled to claim losses or back billing from 14 October 2008 until 12 May 2011 since there was no evidence to show that there was meter tampering prior to 12 May 2011; and (iii) the drop in the usage of electricity was due to lower production during that period. The Judicial Commissioner ('JC') allowed the respondent's claim and hence, this appeal. *Vide* this appeal, the appellant asserted that (a) the respondent failed to prove that the appellant had tampered with the wiring on the floor of the premises or meter installation; and (b) the claim for loss of revenue by the respondent for the period between 14 October 2008 to 12 May 2011 was made without basis.

Held (dismissing appeal with costs)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) The finding of facts by the learned JC was properly supported by good reasons. The trial judge always had the audio visual advantage to assess the evidence and made findings of facts. Generally, an appellate court will not intervene with the findings of a trial judge unless the trial judge had, *inter alia,* so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching a conclusion, or had not properly analysed the entirety of the evidence and relevancy of it. (para 15)

(2) SD1's evidence was a mere hearsay since he had only joined the appellant company after the inspection and investigation of the tampering. There was no evidence to substantiate SD1's contention that he was a consultant to the appellant even before he started work there and thereby was aware of the alleged tampering incident. The learned JC gave very little probative value to his testimony. (para 12)

(3) The RMR reading was only used to read the meter on the usage of electricity in order to issue the monthly billing and not for the purpose of detecting discrepancy such as this. If there was any discrepancy in a meter reading, the RMR would not be able to detect them. The tampering could only be detected through investigations conducted and in this case, the tampering was clearly proved. SP4 had demonstrated positively in specific terms as to how the tampering to all the three phases was done and brought the confiscated meter to demonstrate his explanation. (paras 13 & 14)

(4) The average usage was computed based on a stable period of usage before the sudden surge detected in October 2008. Thereafter, there was no further increase in the usage for the red phase. SP3 explained as to how he had arrived at his computation based on the graphs of usage in exhs. P8 and P9. SP3's evidence was correctly accepted and the explanation of back billing as a *prima facie* proof under s. 38(4) of the Act. The appellant failed in its attempt to challenge SP3's evidence since it did not adduce credible evidence to dispute a *prima facie* case and the evidence of SP3 in establishing the *prima facie* case for the respondent. The JC had considered the challenge made by SP3's billing but rejected the evidence adduced through SD1 for lack in probative value. Thus, there was no misdirection by the JC. (paras 18 & 19)

(5) There was no evidence to support the appellant's case that the drop in the usage was attributed by its lower production. The appellant was left with no evidence to rebut any presumption under s. 38(4) of the Act relied by the respondent. Further, the computation had been properly and reasonably explained which had not been contradicted by any acceptable evidence by the appellant. (paras 20-22)

(6) The requirement for a conviction was unnecessary for the respondent to make a claim under s. 38(4) of the Act. The appellant failed to rebut the presumption by contending that the appellant had reduced its production. When a comparison was made between the month of October 2008 with November and December 2008, January to June 2009, January to March and May 2011, the production of the appellant was in fact higher but the electricity consumption was much reduced. The back billing was thus reasonably computed and had not been rebutted by the appellant. In the circumstances, this court agreed with the findings of the JC that there was tampering of the meter in this case. (paras 23-25)

Case(s) referred to:
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***
Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor And Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***
Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 10 CLJ 14 CA ***(refd)***
Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, s. 38(3), (4)

For the appellant - Ang Khoon Cheong; M/s CP Ang & Co
For the respondent - Rusmin Alwani Shukery & Nurmunirah Abu Bakar; M/s Rusmin Ida & Taryna

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: 22NCVC-365-05-2012 (affirmed)]

Reported by Kumitha Abd Majid

JUDGMENT

Rohana Yusuf JCA:

[1] This is an appeal against the decision of the High Court in Penang which allowed the claim by the respondent (TNB) against the appellant for the sum of RM428,327.24 with costs for loss of revenue resulting from meter tampering. This claim was based on s. 38 of the Electricity Supply Act 1990 ("ESA"), in particular s. 38(3) which reads:

> (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under s. 37(1), 37(3) and 37(14) and any reasonable expenses directly incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

[2] The appellant, Kepala Batas Bihun Sdn Bhd is a private limited company operating a noodle processing business at No. 1239, Jalan Lahar Kepar, 13200 Kepala Batas, Pulau Pinang. The appellant received supply of electricity from the respondent for the purpose of the appellant's business.

[3] Upon an inspection carried out by the respondent's officer (SP1) on the pepasangan meter (meter board) at the appellant's premises on 12 May 2011 it was discovered that the meter board did not record the correct usage of the electricity. The Red Phase in particular recorded a zero reading instead. This zero reading was seen on the meter board.

[4] A second team of officers was dispatched by the respondent to the premises to conduct a follow up inspection about a week later on 17 May 2011. This team was headed by SP2. SP2 similarly recorded a zero reading as shown on the Borang Pemeriksaan Meter LPC Voltan Rendah. The record prepared by SP2 is at p. 149 Rekod Rayuan Bhgn C Jilid 1. SP2 found that the wiring for the arus pendua for Fasa Red Phase (Fasa Merah) was not connected. As a result of the disconnection SP2 said for this Red Phase the main current on the meter board showed a zero reading. Accordingly this zero reading could be seen by the naked eye. The presence of both inspection teams on 12 May 2011 and 17 May 2011 respectively, was recorded on the appellant's visitor's log.

[5] SP4 testified that a remote meter reading (RMR) installed in relation to the appellant's premises enabled the respondent to read the appellant's meter from the respondent's office and to issue the monthly electricity bill without the need for a meter reader to be present at the appellant's premises. SP4 testified and explained that if the Red, Blue and Yellow Phase were disconnected then there would be zero reading for these phases on the meter board and these zero reading would be shown by the remote meter reading (RMR). The zero reading recorded for the Red Phase by the inspection team on 17 May 2011 at the appellant's premises would also be shown by the RMR.

[6] On the suspicion the team investigated and found tampering. The tampering of the meter was discovered upon the breaking up of the concrete cement conducted in order to inspect the discrepancy in Red Phase meter reading. The Red, Blue and the Yellow Phases were located between the current transformer (CT) to the TNB's terminal underground. The metal conduit had the markings of being broken or being cut in respect of the Red Phase. The same broken markings were also found for the Yellow and Blue Phases which however had been restored using black tape. The photographs of the above description of tampering were produced to evidence the explanation of tampering.

[7] Pursuant to s. 38(3) of the ESA the respondent made a claim for the loss of revenue. In claiming for back-billing charges SP3 testified that the calculation as at 12 May 2011 was based on the daily average use of electricity calculated for a period of four months prior to a sudden drop of the usage. SP3 referred to the Pengiraan Bil Kebelakang and Graf Perbandingan Penggunaan Elektrik (Rekod Rayuan Bhd C Jilid 1). According to SP3 there was a sudden drop of usage of electricity by the

appellant on 14 October 2008. Therefore the back-billing charges were calculated from 14 October 2008 until 12 May 2011 (date of inspection). SP3's testimony can be found at pp. 109 to 110 of Rekod Rayuan Tambahan. The respondent claimed for the sum of RM428,327.24 as the unrecorded usage of electricity for the period from 14 October 2008 till 12 May 2011.

[8] In its defence the appellant denied that any tampering of the meter installation at its premises had taken place.

[9] Having assessed the evidence before her the learned Judicial Commissioner (JC) had found the respondent's case proven on the balance of probabilities and allowed the claim as prayed.

[10] In the appeal before us the appellant had raised two main grounds. The appellant contended firstly that the respondent had failed to prove that the appellant had tampered with the wiring on the floor of the premises or meter installation. Secondly the appellant contended that the claim for loss of revenue by the respondent for the period between 14 October 2008 to 12 May 2011 was made without basis.

Our Decision

[11] We have perused through the grounds of judgment of the learned JC very carefully. In concluding that there was tampering, the learned JC had in her grounds of judgment explained in great detail how the tampering was discovered by the representatives of the respondent through their investigation, upon noting the discrepancy in meter reading involving the Red Phase. There were photographs tendered in court P6(1) to (36) to show the tampering. The learned JC had accepted the explanation by both SP2 and SP4 on the same. Both the witnesses had explained in meticulous detail as to how they conducted the test on the tampering. The evidence was carefully analysed and were clearly considered at paras. 21 to 38 of Her Ladyship's ground of judgment.

[12] The learned JC had also considered the evidence of the appellant in defence given through SD1. In Her Ladyship's finding the evidence of SD1 was mere hearsay because SD1 had only joined the appellant company after the inspection and investigation of the tampering. SD1 joined the company only in November 2011. The contention of SD1 that he was a consultant to the appellant even before he started work there and thereby was aware of the alleged tampering incident, was not substantiated by any evidence. The learned JC had therefore given very little probative value to his testimony. It is for this reason also that the learned JC found the evidence of SD1 and of the defence remained mere hearsay.

[13] The learned JC had further considered the issue raised by the appellant that if there was such a tampering it could have been discovered much earlier through the meter reading RMR. On this, the learned JC accepted the explanation by SP5 that RMR was only used to read meter on the usage of

A electricity in order to issue the monthly billing and not for the purpose of detecting discrepancy such as this. It was also the evidence of SP5 which was accepted by the learned JC that if there was any discrepancy in a meter reading the RMR would not be able to detect them. The learned JC in accepting the evidence and explanation by SP5 had taken into account the
B complaint raised by the defendant on the evidence of SP4 relating to RMR, which was at variance with that of SP5. The learned JC instead accepted the evidence of SP5 on RMR because Her Ladyship had found that SP4 was in fact a technician from Jabatan Hasil SEAL. SP4 was not from unit RMR and therefore would not be in the best position to explain on RMR whereas, SP5
C was the Pengurus Cawangan and had clearly explained that RMR could not detect tampering. According to SP5 tampering could only be detected through investigation conducted.

[14] Upon her further analysis of the evidence of all the representatives of the respondent SP1, SP2, SP3 and SP4 and SP5 together with the evidence
D of SD1 above the learned JC had positively concluded that tampering was clearly proven. SP4 according to the learned JC had shown and demonstrated positively in specific terms how the tampering to all the three phases had brought the confiscated meter in exh. P13 to demonstrate his explanation. Having perused through the analysis of the evidence made by the learned JC
E in her grounds of judgment we are in agreement with her facts findings and analysis of evidence in coming to her conclusion.

[15] Suffice for us to say that the finding of facts by the learned JC was properly supported by good reasons for which we are in no position to disturb. The trial judge had always had the audio visual advantage to assess
F evidence and made findings of facts. It is well-established principle that generally an appellate court will not intervene with the findings of a trial judge unless the trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching a conclusion, or has not properly analysed the entirety of the
G evidence and relevancy of it, or misapprehended the facts and blindly applied wrong principles of law (see *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor And Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; [1989] 1 MLJ 35 (SC), *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165 (PC)). We do not find any such error on Her Ladyship's finding of tampering of the meter by the appellant in this case to
H merit our appellate intervention.

[16] The next ground of appeal raised by the appellant was on the quantum claimed by the respondent. The appellant contended that the respondent was not entitled to claim losses or back-billing from 14 October 2008 to 12 May
I 2011 because there was no evidence to show that there was meter tampering

prior to 12 May 2011. Before we deliberate further on this issue we took note that the claim made by the respondent was premised on the provision of s. 38(4) of the ESA. The section reads:

> A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:
>
> (a) The amount of loss of revenue or the expenses incurred by the licensee; and
>
> (b) The person liable for payment thereof, shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

[17] The learned JC relied on the Penyata Amaun Terkurang Caj (exhs. P6 and P7) issued by SP3 as *prima facie* proof of loss of revenue suffered by the respondent pursuant to s. 38(4) above. The appellant's main complaint was that the loss of revenue complained of predated the date SP1 first discovered some evidence of tampering on 12 May 2010. It was therefore contented that the back-billing from 14 October 2008 was made without basis as there was no proof that the tampering in fact took place until it was first discovered by SP1 on 12 May 2010.

[18] It was explained by the witnesses of the respondent on how the back-billing was computed. SP3 had explained that the average usage was computed based on a stable period of usage before the sudden surge detected in October 2008. Thereafter, there was no further increase in the usage for the Red Phase. The learned JC accepted the computation by SP3 who had explained how he had arrived at his computation based on the graphs of usage in exhs. P8 and P9. SP3 explained that he had computed the average use four months prior to the sudden drop date of 14 August 2008. In our view the learned JC had correctly accepted the evidence of SP3 and the explanation of back-billing as a *prima facie* proof under s. 38(4) of the ESA. Calculated on that average the amount came up to RM428,372.24 for the period from 14 October 2008 to 12 May 2011.

[19] Learned counsel submitted that the learned JC had misdirected herself in accepting SP3's evidence on the basis that the appellant did not challenge his evidence. Our perusal of the grounds of judgment shows that the learned JC at para. 42 of her grounds of judgment states "Defendan kedua gagal mencabar keterangan SP3 mengenai cara pengiraan". Reading the judgment as a whole it is quite obvious what the learned JC meant was that the appellant (defendan kedua) had failed in its attempt to impugn the evidence of SP3. The learned JC did not mean that there was no challenge made on SP3's evidence by the appellant. In its proper context it became clear that the learned JC had discussed the attempts by the appellant to challenge on the evidence of SP3 was made, but what she meant was that the appellant had failed in its attempt, because it did not adduce credible evidence to dispute a *prima facie* case and the evidence of SP3 in establishing the *prima facie* case for the respondent. Thus there was no misdirection by the learned

JC but her finding was in fact taken out of context by learned counsel. The grounds of judgment of the learned JC revealed that she had considered the challenge made on SP3's billing but she had rejected the evidence adduced through SD1 for lack in probative value.

[20] The learned JC has clearly addressed the evidence before her and had posed the correct question of the whether the appellant had rebutted that presumption relied by the respondent under s. 38(4) and had done so by adducing sufficient evidence. The learned JC found that in an attempt to rebut that presumption the respondent had through SD1 sought to challenge the back-billing. The appellant attempted to introduce evidence to suggest that the drop in the usage was due to lower production but no credible evidence was put forth to support such stand. There was no evidence to support the appellant's case that, the drop in the usage was attributed by its lower production in those period.

[21] SD1 had attempted to first suggest that the production of the appellant's company for November and December 2008 was lower in order to support a contention of a low usage. SD1 was referring to an identification document marked IDD28 and IDD29 to support his contention though as we have earlier alluded to SD1 had not commenced work with the appellant until November 2011. In cross-examination however counsel for the appellant had informed the court that IDD29 and IDD28 would not be tendered as evidence before the court. With that it left the appellant with no evidence to rebut any presumption under s. 38(4) relied by the respondent.

[22] We were referred to the various decisions by this court on the issue of back-billing claimable by the respondent in cases of tampering. Learned counsel cited to us the decision of this court in *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Berhad* [2015] 10 CLJ 14; [2014] 6 MLJ 461 to contend that the *prima facie* proof under s. 38(4) of ESA is subjected to challenge. We have no issue with the principle of law established in the case cited. Similar legal position was echoed in *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323. In both these cases the Court of Appeal had held that; there must be clear explanation on how a back-billing is computed; it cannot be based on speculation, or done in an arbitrary manner. In the present case we agree with the learned trial judge that the computation had been properly and reasonably explained and it was accepted by the learned JC. The two cases cited had also established that to rebut that presumption the appellant would have to adduce acceptable evidence to contradict the *prima facie* evidence relied upon by the respondent. We would also say that this is a long established legal principle. The learned JC held that given the circumstances of the case the computation was reasonable and had not been contradicted by any acceptable evidence by the appellant. It is apparent that each case would have to be decided on its own facts. These are issues which are facts sensitive and hence the cited cases would not assist the appellant, when the appellant failed to adduce evidence to rebut presumption.

[23] For completeness, we noted that another ground of appeal raised by the appellant was also on issue of whether or not there was a need to have a conviction, before there could be a claim for loss of revenue under s. 38. Even though it was not pursued in the oral submission of learned counsel for the appellant, we noted that the requirement for a conviction is unnecessary for the respondent to make a claim under s. 38(4). The legal position had been made clear by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 301 which held that there is no legal requirement for there to be prosecution and conviction first, before a claim for loss of revenue is sustained.

[24] In conclusion we agree with the learned JC that not only that the appellant failed to rebut that presumption by contending that the appellant had reduced its production, in the end the respondent through SD1 even agreed that when a comparison is made between the month of October 2008 with November and December 2008, January to June of 2009, January to March and May 2011 the production of the appellant was in fact higher but yet the electricity consumption was much reduced.

[25] To sum up, on the evidence in the appeal records we agree with the finding by the learned JC that there was tampering of the meter in this case. And the back-billing by the respondent was reasonably computed and had not be rebutted by the appellant. Both the grounds of appeal raised were devoid of merit. We therefore dismissed the appeal by the appellant with costs of RM20,000 to the respondent.